# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 15, 2006 |
| v | No. 259605<br>Van Buren Circuit Court |
| WILLIAM EARL STAFFORD, JR.,<br><br>Defendant-Appellant. | LC No. 04-014050-FH |

Before: O'Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of resisting, obstructing, or opposing an officer, MCL 750.81d(1).[1] He appeals as of right. We affirm.

In May 2004, defendant had an outstanding warrant for his arrest and was wanted for parole violations. Detective Rought of the Van Buren Sheriff's Department received a tip from defendant's parole officer that defendant was staying in the home of his uncle in rural Van Buren County. On May 7, 2004, several members of the sheriff's department, including detective Rought, converged on the home to arrest defendant. During a search of the home, Rought and another officer found defendant hiding under a child's bed in a bedroom. After defendant was discovered, he managed to escape the home. Following a foot chase, defendant was apprehended and placed under arrest.

Defendant's primary claim on appeal is that he was denied the effective assistance of counsel. Because defendant failed to move for a new trial or an evidentiary hearing with regard to this matter, our review of defendant's claim is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

[1] MCL 750.81d(1) states, "[A]n individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment . . . ."

Whether a defendant has been deprived of the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A judge first determines the facts and then decides whether these facts constitute a violation of defendant's right to effective assistance of counsel. *Id.* Factual findings are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

In reviewing the claim, we will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Effective assistance of counsel is presumed, and "the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant argues that the prosecution, through the testimony of detective Rought, introduced impermissible prior bad acts evidence when she testified that defendant's outstanding warrant was for aggravated assault, and he argues that his counsel was ineffective for failing to object to this statement.

There is a four-part test used when determining if other acts evidence is admissible pursuant to MRE 404(b):

> First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact

> of consequence at trial. Third, under MRE 403, a "'determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision[s] of this kind under Rule 403.'" Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993)(citations omitted).]

Detective Rought's statement, that the warrant outstanding for defendant's arrest was for aggravated assault, was inadmissible pursuant to MRE 404(b). Although the existence of an outstanding warrant for defendant's arrest was relevant to establish that the officers went to the home in Van Buren County to arrest defendant pursuant to their official duties, the fact that the outstanding warrant was specifically for aggravated assault was irrelevant. MRE 401. Irrelevant evidence is inadmissible. MRE 402. Because Rought's statement was irrelevant, it was inadmissible under MRE 404(b). Therefore, an objection to this statement would have been proper.

Nevertheless, we find that defense counsel was not deficient for failing to object to the admission of this statement. The statement was brief, uninvited by the prosecution, and isolated. The prosecution did not follow up on the comment. As our Supreme Court has noted, "[T]here are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Objecting to the statement at issue may have drawn undue attention to the offhand comment. We will not second guess defense counsel with respect to matters of trial strategy, and we conclude that defendant has not overcome the strong presumption that his counsel's failure to object was a matter of sound trial strategy.

Second, defendant argues that his counsel should have objected when Rought testified that she unholstered her gun when she encountered defendant in the residence because she was aware of defendant's violent tendencies. He argues that the testimony constituted inadmissible character evidence under MRE 404(a). MRE 404(a) provides, "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." However, the prosecution did not use Rought's statement to establish or try to show that defendant was violent when he resisted arrest on May 7, 2004. In fact, the prosecution never alleged that defendant engaged in a violent act on that particular day. Rather, Rought mentioned that she was aware of defendant's violent tendencies in order to explain why she unholstered and drew her gun. This evidence was admitted for a purpose other than to prove that defendant was acting in conformity with his violent character, and therefore it is not impermissible character evidence pursuant to MCR 404(a).

Furthermore, Rought's statement that she believed defendant had violent tendencies was relevant pursuant to MRE 401 and 402. The statement explained why Rought drew her gun, specifically for her protection and safety and in accordance with her official duties as an

arresting officer. In addition, the evidence was admissible pursuant to MRE 403 because its probative value was not substantially outweighed by the danger of unfair prejudice. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2002). There has been no such showing in this case. Because the evidence was arguably admissible, we cannot conclude that defense counsel was ineffective for failing to object to it. Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Finally, defendant argues that his counsel was ineffective for failing to object to several instances of alleged prosecutorial misconduct during defendant's cross-examination. Defendant specifically argues that, on four occasions, the prosecutor unfairly compelled defendant to opine on the veracity of other witnesses' testimony. We agree with defendant that the challenged questions constitute misconduct. A prosecutor may not ask a defendant to comment on the credibility of the prosecution's witnesses. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, we do not conclude that the failure of defense counsel to object constitutes ineffective assistance of counsel requiring reversal.

A defendant is not unfairly prejudiced by a prosecutor's questions regarding the credibility or veracity of prosecution witnesses if the defendant handled those questions well. *People v Messenger*, 221 Mich App 171, 182; 561 NW2d 463 (1997), citing *Buckey*, *supra* at 17. In this case, defendant handled the prosecutorial inquiries well. Moreover, defense counsel's failure to object may have been a matter of sound trial strategy. The prosecutor made the questionable inquiries when questioning defendant regarding distinctions between his version of events and the versions provided by prosecution witnesses. Defendant clearly and adamantly disagreed with many of the occurrences described by the officers at trial. Consequently, his ability to opine on their credibility arguably bolstered his version of events and his theory that his version constituted an accurate portrayal of the occurrence. We will not substitute our judgment for that of trial counsel. *Rockey*, *supra* at 76-77. With respect to all of the arguments regarding the alleged ineffective assistance of counsel, even were we to find instances of deficient performance, there was no prejudice to defendant considering the facts of the case, the circumstances surrounding the claimed errors, and the strong evidence of guilt.

Defendant also requests that this Court remand the case for the limited purpose of amending the judgment of sentence.

The trial court instructed the jury that it could find defendant guilty of violating MCL 750.81d(1) if it concluded that defendant resisted, obstructed, or opposed Detective Rought. The jury verdict form indicated that the jury found defendant guilty of the crime of resisting, obstructing, or opposing Detective Rought. While the judgment of sentence contains language labeling the offense as "officer/assault/R&O," this is simply verbiage, or a tagline, generally identifying the statute pursuant to which defendant was convicted. The judgment of sentence accurately indicates that defendant was convicted under MCL 750.81d(1), and, in the unlikely

event this matter ever became an issue, the record clearly reveals the basis of the jury's verdict such that defendant's rights will not be compromised. Therefore, remand is unnecessary.

Affirmed.[2]

/s/ William B. Murphy
/s/ Kurtis T. Wilder

I concur in result only.

/s/ Peter D. O'Connell

[2] Defendant submitted a standard 4 supplemental brief; however, the brief contains nothing but a rambling statement professing innocence, without any legal argument, legal analysis, or citation of authority. The brief presents no legal basis for reversal.